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Senate

THE JUDICIARY

Mr. CARPER. Mr. President, yesterday I was in my State capital, Dover, DE, before I came down here. I was a short distance from a place called the Golden Fleece Tavern. It no longer exists, but it was the site of the place where Delaware became the first State to ratify the Constitution. They did that on December 7, 1787. That action took place a couple of months after a Constitutional Convention about 75 miles up the road in Philadelphia.

Some of my colleagues may recall that one of the last issues resolved at the time of the Constitutional Convention was the question of how they were going to select these judges, the third branch of our Government. How do we select these judges? There were some at that time who were fearful of creating a Presidency that would be too strong, having had a bite of the apple of putting up with a king of England for a number of years. They did not want to create a king or someone of royalty in this country to be our leader. Our Founding Fathers worked diligently in any number of ways to create checks and balances to ensure that we didn't end up with a king but ended up with a President. Among the checks and balances they incorporated into our Constitution is one that deals with the selection of our judges. We all know how Presidents nominate and the Senate confirms or does not confirm nominees to lifetime appointments to the Federal bench.

Twice in our Nation's history we have seen instances where a President sought to

stack the courts. Both were Democrats. One was Thomas Jefferson at the beginning of his second term as President, and a second was FDR at the beginning of his second term as President. Both times, both Presidents, both Democrats, were rebuffed. Today, Democrats no longer reside in the White House. Today, the Republicans are in the majority here in the Senate and in the House of Representatives.

With the election of last November, President Bush is in a position to see much--not all, but a good deal--of his legislative agenda approved; perhaps modified but ultimately approved. He is also in a position to leave an even more enduring legacy through his nomination of hundreds of judges in the Federal courts of almost every State. In President Bush's first term, he nominated over 200 men and women to the Federal bench, and 215 nominees were actually debated here on the Senate floor, and 205 were approved. That is an approval rate of about 95 percent. Of the 10 who were not approved, our side would say they were simply out of the mainstream.

As the 108th Congress concluded last year, the vacancy rate stood at the lowest, I believe, since the Reagan era. How did that compare with the Clinton era? In President Clinton's time as President for 8 years, 81 percent of his Federal nominees were approved, as compared to 95 percent of President Bush's in the last 4 years. It is kind of an irony, at least to me, that 81 percent

for President Clinton was enough, it was OK, but 95 percent for President Bush is unacceptable.

While our Republican friends are prepared to change the rules of the Senate in an effort to make it a lot easier to confirm Federal judges, and are poised, I am told, to turn some 200 years of precedent on its head because 95 percent may not be enough, I think to do so would be a mistake.

We have a chance to pass not only class action legislation, but we have a chance to pass bankruptcy legislation, asbestos litigation reform, a comprehensive energy policy, restructuring of the postal system for the 21st century, and on and on. This could be the most fruitful legislative session in recent memory. I would hate to see us destroy that potential.

I say also that the slope we get on with respect to changing the way we close off debate on judicial nominations is a slippery one. Today, we may want to apply it to judicial nominations; later on we may want to apply it to nominees for Cabinet positions or nominations for other positions. It is a slippery slope.

My Republican friends would be wise to listen to former Republican Senators who served on that side of the aisle, people such as Senators Wallop, McClure, Danforth, and today Senator Dole, Robert Dole. They reminded today's Republican Senators, the majority in the Senate, that the bed we make today is one we may have to sleep in. There won't always be a Republican President. Some day there will be a Democrat President. It could be 4 years from now. There will not always be a Republican majority in the Senate. It goes back and forth.

I say to my friends on the other side of the aisle, before we go down this road, keep in mind a couple of things. No. 1, we have the potential to get so much done this year. I would hate to see us blow that opportunity.

No. 2, this is a slippery slope--a policy change that may be designed initially to make it easier to confirm judicial appointments but could easily be applied to other appointments to other positions.

No. 3, some Democrats would take some consolation in the thought that we are not going to always be in the minority, and as there was a Democrat President for the last 8 years for the last century, there will be another one in the future.

My Republican friends, be careful of the bed you make because someday you will have to chance to sleep in it.

Thank you, Mr. President.